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80-1777
No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID ORGELL, INC.,

Petitioner,

v.

JOSIAH WEDGWOOD & SONS, INC.,

Respondent,

and

GEARY'S STORES, INC., BACCARAT, INC., BUCCELATTI, INC., and CERALENE, INC.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether summary judgment on the basis of the statute of limitations may be granted in favor of a manufacturer of products in the face of a continuing conspiracy and concerted refusals to deal both prior to and within the limitations period and absent any indication that plaintiff's business was immediately and permanently destroyed, on the theory that repeated refusals to deal over ten years subsequent to the original refusal were merely reaffirmations of the original refusal?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID ORGELL, INC.,

Petitioner,

v.

JOSIAH WEDGWOOD & SONS, INC.,

Respondent,

and

GEARY'S STORES, INC., BACCARAT, INC., BUCCELATTI, INC., and CERALENE, INC.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner David Orgell, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 19, 1981, affirming the summary judgment of the United States District Court for the Central District of California entered on January 10, 1979, dismissing, as time barred, petitioner's complaint as against respondent Josiah Wedgwood & Sons, Inc. for violation of Sections 4 and 16 of the Clayton Act, U.S.C. §§15, 26 and Section 1 of the Sherman Act, 15 U.S.C. §1, predicated upon respondent's and defendants' alleged continuing conspiracy and concerted refusal to deal with petitioner.

OPINION BELOW

The January 19, 1981, unsigned memorandum of the court of appeals announcing the judgment at issue appears in the appendix hereto ("App.") at 1a. The court of appeals memorandum will be published as an opinion pursuant to an order of the court of appeals filed on March 16, 1981, which order appears at App. 4a. The unpublished order of the district court entered October 20, 1978, granting respondent Wedgwood's motion for summary judgment appears at App. 5a. The unpublished stipulation and order of the district court filed December 1, 1978, whereby the parties stipulated that upon affirmance on appeal of the summary judgment the district court shall dismiss the complaint with prejudice against all defendants appears at App. 8a. The unpublished order and judgment of the district court entered January 10, 1979, dismissing petitioner's complaint with prejudice and entering final judgment for respondent pursuant to Federal Rules of Civil Procedure, Rule 54(b) appears at App. 11a.

JURISDICTION

The judgment of the court of appeals sought to be reviewed by this petition was entered on January 19, 1981 and appears at App. 13a. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 Sherman Act, 15 U.S.C. §1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . ."

Section 4 Clayton Act, 15 U.S.C. §15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent. . ."

Section 4B Clayton Act, 15 U.S.C. §15b:

"Any action to enforce any cause of action under sections 15 . . . of this title shall be forever barred unless commenced within four years after the cause of action accrued. . ."

STATEMENT OF THE CASE

Petitioner David Orgell, Inc. ("Orgell"), owns several retail stores which sell silver, china and crystal in the Los Angeles, California area.[1] Respondent Josiah Wedgwood & Sons, Inc. ("Wedgwood") is in the business of selling china, dinnerware and jasperware to retail stores throughout the world. The principal competitor of Orgell in the Beverly Hills, California area, in which Orgell is located, is respondent Geary's Stores, Inc. ("Geary's"). Geary's is a customer of Wedgwood and of the other defendants.

Commencing in 1965, Wedgwood denied requests by Orgell to purchase the Wedgwood line of products, which refusal to deal was reiterated in 1968. In 1972, letters were exchanged between counsel for Orgell and Wedgwood with respect to said refusals to deal. During the years 1976-1978, Wedgwood, on two additional occasions, refused to deal with Orgell.

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[1] All facts herein are undisputed and are set forth in the court of appeals opinion below. Citations in this statement of the case are provided only for quoted portions of the opinion.

On April 16, 1978, Orgell filed a complaint against Geary's, Wedgwood and the other respondents in the United States District Court for the Central District of California for violation of Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 and Section 1 of the Sherman Act, 15 U.S.C. §1, alleging that respondent and defendants had conspired with each other and with Geary's not to sell their products to Orgell and agreed to favor Geary's in connection with the sale of their products.

On August 18, 1978, Wedgwood filed a motion for summary judgment, invoking the provisions of Section 4B of the Clayton Act, 15, U.S.C. § 15b and contending that Orgell had not commenced suit within four years after the cause of action accrued.[2] On October 19, 1978, the district court granted Wedgwood's motion for summary judgment, finding that "plaintiff, as a result of Wedgwood's continuing refusals suffered no new injury. . . [and] . . . that the last act causing injury occurred as a result of Wedgwood's initial 1965 refusal to deal with the plaintiff, and that each time Wedgwood repeated the refusal, it was a reaffirmation of the original decision not to deal with the plaintiff." App. 7a.

Pursuant to stipulation of the parties and order of the district court, the district court indicated its intention to direct entry of judgment against Orgell and in favor of Wedgwood and, further, ordered that if said judgment shall be affirmed on appeal and become final, that the complaint would be dismissed with prejudice against all defendants. App. 8a-10a. On January 10, 1979, the district court entered an order and judgment dismissing the complaint with prejudice as to Wedgwood and entering final judgment for Wedgwood pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. App. 11a-12a.

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[2] In support of and for purposes of its motion, Wedgwood relied solely upon and adopted the limited facts adduced through the deposition testimony of David Orgell, President of petitioner, App. 14a-16a, and affidavits of attorneys regarding the above-described exchange of letters.

On January 19, 1981, the United States Court of Appeals for the Ninth Circuit affirmed. App. 1a-3a. Said court held that "any injury to Orgell resulted from Wedgwood's 1965 refusal to sell," App. 3a, and that, therefore, the district court correctly concluded that Orgell's action was time barred.

REASONS FOR GRANTING THE WRIT

This case involves matters of substantial importance concerning the application of the antitrust laws, specifically, the propriety of transforming the statute of limitations with respect to admitted continuing conspiracy and refusals to deal from a statute of repose to one of continued, interminable immunity. By the judgment and opinion sought to be reviewed in this petition, the Ninth Circuit has effectively held that a plaintiff which suffers continuing damage from a continued exclusion from the market is barred not only from proving violations and damages more than four years old, but is barred forever from complaining of this continuing unlawful conduct.

In so ruling, the Ninth Circuit may have placed itself squarely in conflict with its own precedential opinions as well as those of the Third, Fifth and Eighth Circuits, which have held that continuing refusals to deal constitute claims under the antitrust laws unless the pre-limitations refusal to deal results in the immediate and permanent destruction of plaintiff's business. Additionally, the opinion and judgment below ignores the principle established by this Court that the antitrust laws were enacted to redress antitrust harm and protect competition, not competitors. Restoring a uniformity among the circuits and reiterating this well established principle warrants this Court's plenary review of the ruling below.

I. The Court of Appeals, In Affirming the Granting of Summary Judgment by the District Court on the Basis of the Statute of Limitations, May Have Ignored its Own Precedents, and Misapplied the Limitations Statute to Grant the Respondent an Interminable Immunity from the Anti-trust Laws.

The Ninth Circuit held below that "here, any injury to Orgell resulted from Wedgwood's 1965 refusal to sell." App. 3a. As a basis for this ruling, the court of appeals, ignoring all cases cited by the district court, cited and misapplied to this proceeding only one case, *In Re Multidistrict Vehicle Air Pollution v. General Motors Corp.*, 591 F.2d 68 (9th Cir.), *cert. denied* 444 U.S. 900 (1979). In *In Re Multidistrict*, a manufacturer of air pollution control devices brought an action against several automobile manufacturers alleging a conspiracy to refuse to purchase plaintiff's product. Plaintiff alleged overt acts on the part of defendants in furtherance of a conspiracy to exclude it from the market both prior to and during the four year limitations period. The court of appeals in *In Re Multidistrict* found that "nothing in the record indicates other than that the 1964 decisions [not to purchase after-burner devices from plaintiff] were irrevocable, immutable, permanent and final. For this reason, all injury to plaintiff necessarily results from the 1964 rejection from the Smog Burner." 591 F.2d at 68.

At issue were smog control devices for the 1966 car model year. The court of appeals listed numerous facts indicating that plaintiff itself was convinced that it was out of the market for that model year. "Appellees had indicated clearly and irrevocably an intent to look to their own devices or modifications thereof for the 1966 model year. . . . The record indicates that AMF itself was convinced by the last quarter of 1964 that it was out of the market." 591 F.2d at 72. Recognizing that the record had demonstrated that plaintiff's opportunity to enter the market was necessarily precluded by time and that plaintiff's actions reflected that fact, the court of appeals concluded that

subsequent contacts by AMF were "forlorn inquiries by one all of whose reasonable hopes had been previously dashed." 591 F.2d at 72. The Ninth Circuit, in the opinion below, quoted this identical language and reached the same conclusion. App. 3a.

In *In Re Multidistrict, supra* the court of appeals discussed in detail and followed the well defined law on this issue as articulated in several opinions of the Fifth Circuit Court of Appeals. Specifically, the Ninth Circuit in *In Re Multidistrict* quoted at length from *Poster Exchange, Inc. v. National Screen Service Corp.* 517 F.2d 117 (5th Cir.), *cert. denied* 423 U.S. 1054 (1976), wherein an alleged conspiracy had excluded plaintiff from access to supplies for a period stretching beyond the four year limitations period. In *Poster Exchange, supra* the Fifth Circuit stated:

> ". . . Where the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, then the acts causing damage are unrepeated, and suit must be brought within the limitations period and upon the initial act.
>
> * * *
>
> ". . . Here, Poster complains that during the four-year period sued upon, it has been continually injured by Columbia's and National Screen's conspiratorial foreclosure of Poster from access to supplies. Under *Zenith* [*Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321 (1971)] we are obliged to recognize Poster's continually accruing cause of action during this period.
>
> "Moreover, aside from the conclusive effect of these authorities, any other result here would, we think, improperly transform the limitations statute from one of repose to one of continued immunity. For according to Columbia's argument, a plaintiff who suffers continuing damage from the continued invasion of a monopoly and exclusion from

> the market is barred not only from proving violations and damages more than four years old, but is barred forever from complaining of the continuing excuse [sic] of the unlawful conduct." 517 F.2d at 126-127.

Accordingly, the Fifth Circuit remanded for a determination as to "whether there was, during the period sued upon, a mere absence of dealing, or whether there was some specific act or word precluding [plaintiff] from obtaining supplies from [defendant]." *Id.*[3]

The court below failed to recognize the crucial distinction between the "irrevocable, immutable, permanent and final," refusal of *In Re Multidistrict*, and refusals, which "while perhaps unequivocal [were] not of necessity permanent. . . ." *Poster Exchange, supra* at 127. Permanency with respect to refusals to deal clearly does not refer to the emphatic nature of the refusing party's negative response, but rather situations "where the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, . . ." *In Re Multidistrict, supra* at 72, quoting *Poster Exchange, supra* at 126-127.

The undisputed evidence before the district court in this proceeding consisted solely of deposition testimony of Orgell which Wedgwood adopted, for purposes of its summary judgment motion, as a statement of undisputed facts. App. 14a-16a. These "facts" merely set forth the continuing refusals to deal by virtue of the continuing conspiracy between Wedgwood and Geary's. They in no manner demonstrate that the "violation is final at its impact," that "plaintiff's business [was] immediately and permanently destroyed," or that the "actionable wrong [undertaken by Wedgwood and Geary's] is by its nature permanent at initiation without further acts, . . ." *In Re Multidistrict, supra* at 72. All that is demonstrated by these facts is Wedgwood's repeated negative response to Orgell's request to purchase products, not the permanent denial of a

[3] As the undisputed facts demonstrate, far from conceding that it was out of the market, Orgell continued to make requests to purchase and was met with refusals within the limitations period. App. 14a-16a.

limited business opportunity or the destruction of Orgell's business. Quite clearly, the court of appeals' reliance upon *In Re Multidistrict*, in which plaintiff had only a limited opportunity to sell its goods which, when refused, was gone forever, is misplaced and ignores the precedent set by the case and the *Poster Exchange* decision upon which it is predicated. It leaves Wedgwood free to continue the conspiracy into the interminable future.

The instant case may also be contrary to the Ninth Circuit's most recent ruling in *Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188 (9th Cir. 1980), on the propriety of granting summary judgment on the basis of the statute of limitations in a concerted refusal to deal situation. Plaintiff in *Program Engineering* filed an antitrust action alleging restraint of trade, monopolization and improper refusals to deal. The district court dismissed on the basis, *inter alia*, of the statute of limitations. The Ninth Court reversed on that issue and stated:

> "Having established that [defendant] committed certain overt acts within the limitation period, the appellants could avert a summary judgment by showing that there is a genuine issue of material fact relevant to whether the acts are antitrust violations." 634 F.2d 1194.

See also, Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d. 1264, 1270 (1975), wherein the Ninth Circuit rejected the statute of limitations defense quoting this Court's statement in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 329 U.S. 481 (1968), "We are not dealing with a violation which, if it occurs at all must occur within some specific and limited time span. [Citation omitted.] Rather, we are dealing with conduct which constitutes a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm. . ." *Hanover Shoe, supra* at 502 n.15.

Petitioner submits that while *In Re Multidistrict, supra* cites and is consistent with the Fifth Circuit's *Poster Exchange, supra* decision, and while *Poster Exchange* unquestionably

supports petitioner, the court below ignored *Poster Exchange*, decisions of other circuits and also its own *Twin City, supra* opinion only to misapply the unique and limited facts of *In Re Multidistrict* to the more mundane refusal to deal facts of this case. Under such circumstances, summary judgment was improperly affirmed by the court below.

II. The Ninth Circuit's Application of the Statute of Limitations Conflicts With Decisions of the Third, Fifth and Eighth Circuits.

As set forth hereinabove, the Fifth Circuit Court of Appeals has adopted the general rule that a new cause of action accrues with each injurious act committed against an antitrust plaintiff. *Poster Exchange, supra; see also Imperial Point Colonnades Condominium v. Mangurian*, 549 F.2d 1029, 1042 & n. 22 (5th Cir.), *cert. denied* 434 U.S. 859 (1977); *Braun v. Berenson*, 432 F.2d 538 (5th Cir. 1970). The Third Circuit Court of Appeals in *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127 (3rd Cir. 1978) specifically adopted the position of the Fifth Circuit and quoted at length from the *Poster Exchange* and *Imperial Point* decisions. 587 F.2d at 139 & n. 44, 45.

In *Pioneer Co., Inc. v. Talon, Inc.* 462 F.2d 1106 (8th Cir. 1972), Associate Justice Tom C. Clark, sitting by designation, authored an opinion which held that notwithstanding pre-limitations period refusals to deal, the subsequent refusals of two orders placed by plaintiff within the limitations period "were a separate cause of action and in light of the continuing conspiracy were not barred by the statute. . ." 462 F.2d at 1108.

It is evident that the court below in this proceeding may have not only misapplied and ignored Ninth Circuit precedents, but issued an opinion conflicting with the Third, Fifth and Eighth Circuits regarding the application Section 4B, 15 U.S.C. §15b of the Clayton Act to refusal to deal situations. The

impact of this section upon continuing conspiracies and refusals to deal must not be permitted to vary from circuit to circuit, since the inevitable result is a crazy-quilt application of the antitrust laws throughout the nation. To achieve the requisite minimum of nationwide uniformity among the circuits, this Court should grant certiorari.

CONCLUSION

The court below, in a rather preemptory manner, affirmed the dismissal of an antitrust complaint by its mechanical and incorrect application of one recent case in the same circuit. By so doing, the Ninth Circuit Court of Appeals ignored the continuing antitrust violations resulting from the concerted refusal to deal, *i.e.*, the continuing injury to competition, not merely a continuing pecuniary injury to plaintiff. By giving the statute of limitations provision of the Clayton Act an interpretation contrary to its own precedents and that of other circuits, the Ninth Circuit Court of Appeals left matters in a posture clearly calling for this Court's review. Moreover, by employing the limitations statute to immunize repetition or continuation of violations, the opinion of the court below not only extends the statute beyond its purpose, but also conflicts with the policies of vigorous enforcement of public rights through private antitrust actions. For this reason, and for all the foregoing reasons, David Orgell, Inc., prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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April 20, 1981.

No. 79-3108 D.C. No. 78-1349

[Stamped filed January 19, 1981]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID ORGELL, INC.
Appellant,
v.
GEARY'S STORES, INC.; BACCARAT, INC.; BUCCELATTI, INC.; and CERALENE, INC.,
Defendants,
and
JOSIAH WEDGWOOD & SONS, INC.,
Appellee.

MEMORANDUM

Appeal from the United States District Court
for the Central District of California
Harry Pregerson, District Judge, Presiding
Argued and submitted, December 5, 1980

Before: CHAMBERS and TANG, Circuit Judges, and SOLOMON,* District Judge.

David Orgell, Inc. (Orgell) appeals from a summary judgment for Josiah Wedgwood & Sons, Inc. (Wedgwood). We affirm.

Orgell owns several retail stores which sell silver, china, and crystal in the Los Angeles area. Wedgwood sells china, dinnerware, and jasperware to retail stores in many parts of the world. Orgell's principal competitor in Beverly Hills is Geary's Stores, Inc. (Geary's), one of Wedgwood's customers. Orgell

* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

contends that Wedgwood refused to sell to Orgell as the result of a conspiracy between Wedgwood and Geary's.

Wedgwood first refused to sell to Orgell in 1965. It again refused to sell to Orgell in 1968. In 1972, Orgell retained a well-known Los Angeles law firm which wrote Wedgwood that its refusal to sell to Orgell had antitrust implications. Wedgwood's attorney denied that Orgell had any grounds for complaint. On at least two occasions in 1976 and 1977, Orgell requested the opportunity to buy the Wedgwood line, but both times Wedgwood refused to sell.

On April 16, 1978, Orgell filed this action in the district court. It alleged that Wedgwood together with Geary's had violated Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, and Section 1 of the Sherman Act, 15 U.S.C. § 1.

Wedgwood filed a motion for summary judgment. The court granted the motion on the ground that Orgell had not "commenced suit within four years after the cause of action accrued." Section 4B of the Clayton Act, 15 U.S.C. § 15b

In this appeal, Orgell concedes a four year statute of limitations but it contends that this period had not elapsed because each of Wedgwood's refusals to sell was a separate antitrust violation.

In *In re Multidistrict Vehicle Air Pollution* v. *General Motors Corp.*, 591 F.2d 68 (9th Cir. 1979), *cert. denied,* U.S. (1980), a manufacturer of air pollution control devices brought an action against several automobile manufacturers alleging a conspiracy to refuse to purchase the plaintiff's product. The plaintiff filed its action more than four years after the initial refusal to deal but alleged that the statute of limitations did not apply because each subsequent refusal created a new cause of action. The court rejected that argument, stating:

> Nothing in the record indicates other than that the 1964 decisions, as to AMF, were irrevocable, immutable, per-

manent and final. For this reason, all injury to AMF necessarily resulted from the 1964 rejection of the Smog Burner.

Id. at 72.

Here, any injury to Orgell resulted from Wedgwood's 1965 refusal to sell. Orgell's subsequent requests "were forlorn inquiries by one all of whose reasonable hopes had been previously dashed." *Id.* The district court's order granting summary judgment stated, "each time Wedgwood repeated the refusal, it was a reaffirmation of the original decision not to deal with the plaintiff. Since the original refusal pursuant to the alleged conspiracy occurred over a dozen years ago, this action is time-barred by the four year statute of limitations." We agree.

The district court's order granting summary judgment on the ground that Orgell's action is time-barred is

AFFIRMED.

No. 79-3108 D.C. No. 78-1349

[Stamped filed March 16, 1981]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID ORGELL, INC.,
Appellant,
v.
GEARY'S STORES, INC.;
BACCARAT, INC.;
BUCCELATTI, INC.,
and CERALENE, INC.,
Defendants,
and
JOSIAH WEDGWOOD & SONS, INC.,
Appellees.

ORDER

Before: CHAMBERS and TANG, Circuit Judges, and SOLOMON,* District Judge

Pursuant to a request of the panel, it is hereby ORDERED that the Memorandum disposition entered herein on January 19, 1981, be published as an authored Opinion by Judge Solomon.

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Civil No. 78-1349-HP

[Stamped filed October 19, 1978]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID ORGELL, INC., *Plaintiff,* v. GEARY'S STORES, INC., et al., *Defendants.*	ORDER GRANTING DEFENDANT WEDGWOOD'S MOTION FOR SUMMARY JUDGMENT

This matter is before the court on defendant Wedgwood's motion for summary judgment. Having considered the pleadings, the memoranda of law, and the oral argument of counsel heard on September 18, 1978, the court concludes that Wedgwood's motion for summary judgment should be granted.

The court notes that plaintiff did not comply with Local Rule 3(g)(2) providing that any party opposing a motion for summary judgment shall "serve and file a concise 'statement of genuine issues' setting forth all material facts to which it is contended there exists a genuine issue necessary to be litigated." Plaintiff, however, did file a statement asserting that defendant's contentions of fact are insufficient to support its motion.

In *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289-90 (1968), the Supreme Court stated that a plaintiff opposing a motion for summary judgment in an antitrust action cannot merely rest on the allegations contained in his complaint; he must produce significant probative evidence to support his allegations. In addition, Local Rule 3(g)(3) provides:

> In determining any motion for summary judgment, the court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by affidavit filed in opposition to the motion.

Plaintiff filed no affidavits contesting the facts set forth by defendant. Therefore, this court, in the absence of contrary factual assertions, will treat as true the facts asserted by defendant.

Section 4B of the Clayton Act, 15 U.S.C. 15(b), provides that any action to recover treble damages in a private antitrust suit must be commenced within four years after the cause of action has accrued. The accepted rule is that a cause of action for civil conspiracy under the antitrust laws accrues on the date the last act causing injury or damage was committed. *Garelick v. Goerlich's, Inc.*, 323 F.2d 854 (6th Cir. 1963); *Steiner v. 20th Century-Fox Films Corp.*, 232 F.2d 190 (9th Cir. 1952); *Manok v. Southeast District Bowling Association*, 306 F.Supp. 1215 (C.D. Cal. 1969). In *Steiner*, the court held that when a plaintiff alleges a continuing conspiracy causing continuing damage, the statute of limitations runs from the time "the blow which caused the damage was struck." Any injury occurring after the "blow is struck" is not relevant to the issue of when the statute of limitations commences to run, but rather affects only the problem of how much should be allowed in damages. *Steiner*, 232 F.2d at 194-95. The period of limitation is not extended merely because damages from the injury may be continuing. *Saunders v. National Basketball Association*, 348 F.Supp. 649 (N.D. Ill. 1972). Where the alleged antitrust violation involves several refusals to deal, most courts, in determining when the cause of action accrued, distinguish between a final refusal that is subsequently reiterated and subsequent refusals that themselves cause new injury. C. Hills, *Antitrust Adviser* § 11.13, at 710 (2d ed. 1978).

In this action, plaintiff alleges that defendants conspired not to sell their products to plaintiff but to favor Geary's Stores. Wedgwood's initial refusal to sell to plaintiff pursuant to an alleged conspiracy occurred in 1965. Plaintiff contends that at least ten years ago, it again sought to acquire Wedgwood products but was rebuffed. Moreover, in 1972, the law firm of O'Melveny and Myers was retained by plaintiff to pursue its alleged antitrust claim involving Geary's and Wedgwood. The

law firm wrote to Wedgwood and pointed out the possible antitrust implications of its conduct. Wedgwood replied, denying all charges. During the last two years, plaintiff on two occasions sought the opportunity to buy products from Wedgwood and was again refused. Plaintiff undertook no further action until April 16, 1978 when it filed its complaint. Plaintiff, as a result of Wedgwood's continuing refusals, suffered no new injury. Rather, the amount of monetary loss allegedly sustained by plaintiff from the original 1965 refusal simply increased over the years.

The court finds that the last act causing injury occurred as a result of Wedgwood's initial 1965 refusal to deal with the plaintiff, and that each time Wedgwood repeated the refusal, it was a reaffirmation of the original decision not to deal with the plaintiff. Since the original refusal pursuant to the alleged conspiracy occurred over a dozen years ago, this action is time-barred by the four year statute of limitations.

THEREFORE, IT IS ORDERED that defendant Wedgwood's motion for summary judgment be granted.

The Clerk of the Court shall serve copies of this Order, by United States mail, upon the attorneys of record for the parties appearing in this action.

Dated: October 19, 1978.

HARRY PREGERSON

Harry Pregerson
United States District Judge

No. 78-1349 HP

[Stamped filed December 1, 1978]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID ORGELL, INC., *Plaintiff,* vs. GEARY'S STORES, INC. *Defendants*	STIPULATION AND ORDER

WHEREAS:

A. By Order entered October 20, 1978, the Court granted defendant Josiah Wedgwood & Sons, Inc.'s Motion for Summary Judgment on the grounds that the claims asserted in the Complaint against said defendant are barred by the Statute of Limitations;

B. Said Order is not appealable unless the Court makes the determination required under Rule 54(b) of the Federal Rules of Civil Procedure;

C. Plaintiff agrees to dismiss the Complaint with prejudice against all defendants herein when, as and if the dismissal in favor of Defendant Wedgwood becomes final. There is, therefore, no just reason for delay because if the Court's Order entered October 20, 1978 is affirmed, plaintiff will dismiss this action with prejudice as to all defendants;

D. There is now pending plaintiff's motion re discovery originally set for November 6, 1978, continued to November 20, 1978, and then to December 4, 1978.

E. Plaintiff has noticed its depositions to be taken in New York in January, 1979 and has indicated that it intends to obtain other discovery in aid of the said depositions against all

defendants. There is pending and set for December 11, 1978, a Pretrial Conference; but the parties have not completed their discovery, a great deal of it on both sides remaining to be taken if the cause is to be tried before appellate review of the aforementioned Order;

F. The parties are desirous of saving themselves and the Court a great deal of what may be unnecessary work and cost and are desirous of having the Court certify an appeal of the Court's Order under Rule 54(b) of the Federal Rules of Civil Procedure, so there will be no further proceedings in this Court until the appeal is decided.

NOW, THEREFORE, IT IS STIPULATED by and among the attorneys for the respective parties, and by David Orgell, Inc. subject to the approval of the Court, as follows:

1. The Court, in a separate order, may make its express determination that there is no just reason for delay and may expressly direct the entry or judgment against the plaintiff in favor of the defendant Josiah Wedgwood & Sons, Inc.;

2. All proceedings in the trial court including but not limited to depositions and other discovery shall be stayed pending plaintiff's appeal from the said judgment duly and timely made;

3. If the said judgment shall be affirmed on appeal and become final, the Court shall dismiss the Complaint herein with prejudice against all defendants and each party shall bear its own costs.

4. In all other events the action shall proceed in the United States District Court herein.

SCHWARTZ, ALSCHULER & GROSSMAN
MARSHALL B. GROSSMAN
JANIS E. ADAMS

By JANIS E. ADAMS

Attorneys for Baccarat, Inc.,
Buccelatti, Inc. and
Ceralene, Inc.

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By ROY SHULTS

Roy Shults
Attorneys for Josiah Wedgwood & Sons, Inc.

LAW OFFICES OF BERNARD REICH

DAVID ORGELL, INC.
By DAVID ORGELL

By BERNARD REICH

Bernard Reich
Attorney for David Orgell, Inc.

IT IS SO ORDERED.

DATED: DEC. 1, 1978

HARRY PREGERSON

United States District Judge

No. 78-1349-HP

[Stamped filed January 9, 1979]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID ORGELL, INC., *Plaintiff*, vs. GEARY'S STORES, INC.; JOSIAH WEDGWOOD & SONS, INC., BACCARAT, INC.; BUCCELATTI, INC.; and CERALENE, INC., *Defendants*.	ORDER AND JUDGMENT

This matter came on for hearing before the Court, the Honorable Harry Pregerson, United States District Judge, presiding, on the motion of defendant Josiah Wedgwood & Sons, Inc. ("Wedgwood") for summary judgment. The Court having considered the pleadings, the memorandum of law, and the oral argument of counsel heard on September 18, 1978, the Court issued its order granting Wedgwood's motion for summary judgment ("Order") which was entered on October 20, 1978.

Pursuant to the stipulation executed by counsel for all parties herein, filed with the Court on December 1, 1978, and signed by the court on December 1, 1978, the Court finds that there is no just reason for delay of the entry of a final judgment as to defendant Wedgwood, and it is

ORDERED, ADJUDGED AND DECREED:

1. That plaintiff David Orgell, Inc. shall take nothing by its complaint herein against defendant Wedgwood, and that the complaint is dismissed with prejudice as to said defendant;

2. Each party shall bear its costs of suit herein; and

3. The Court, expressly determining, under Rule 54(b) FRCP, that there is no just reason for delay in entering final judgment for defendant Wedgwood hereby expressly directs that final judgment in favor of said defendant and against the plaintiff be entered; and the same is hereby entered.

Dated: January 9, 1979

/s/ HARRY PREGERSON

HARRY PREGERSON
United States District Judge

JUDGMENT entered.

DATED:

_____

Clerk

No. 79-3108 DC CV 78-1349 HP

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID ORGELL, INC.,

Appellant,

vs.

GEARY'S STORES, INC.; BACCARAT, INC.; BUCCELATTI, INC.; and CERALINE, INC.,

Defendants,

and

JOSIAH WEDGWOOD & SONS, INC.,

Appellee.

APPEAL from the United States District Court for the CENTRAL District of CALIFORNIA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the CENTRAL District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and Entered January 19, 1981

No. 78-1349-HP

[Stamped filed August 18, 1978]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID ORGELL, INC.,
Plaintiff,
vs.
GEARY'S STORES, INC., JOSIAH WEDGWOOD & SONS, INC., BACCARAT, INC., BUCCELATTI, INC., and CERALENE, INC.,
Defendants.

Hearing Date: Sept. 11, 1978
Time: 10:00 A.M.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANT JOSIAH WEDGWOOD & SONS, INC.

STATEMENT OF UNDISPUTED FACTS

Solely for the purposes of this motion, and without waiving any of its rights, claims or factual positions in the event this litigation should continue, Wedgwood will take as given the testimony of plaintiff's principal, Mr. David Orgell. That testimony has led to certain uncontradicted facts.

Orgell is " . . . claiming that the defendants, Geary's, are conspiring with certain suppliers listed to exclude us from purchasing directly from them and because of that we are suffering damages." (D. Orgell Depos., p. 45, lines 8-11). Orgell originally sought the Wedgwood line " . . . at least ten years ago." (*Id.*, line 25.) On that occasion, Mr. David Orgell spoke to a Mr. Thomas of Wedgwood, who reportedly told Mr. Orgell that Wedgwood had "arrangements" in the vicinity. (D. Orgell Depos., p. 47, lines 12-13). That is to say, Wedgwood had another customer "very close to me . . . " and " . . .

didn't want another account right in that vicinity." (*Id.*, lines 15-16). Thus, Mr. Thomas refused Orgell the Wedgwood line. *Id.*, line 18.

Wedgwood's initial refusal to deal with Orgell likely occurred twelve or thirteen years ago, rather than ten. Mr. Orgell testified that a Mr. Donald Rose, who was Wedgwood's salesman for the "Beverly Hills territory", refused to supply Mr. Orgell and his store in 1965-1966. Mr. Orgell testified that Mr. Rose said: "Well, you know the relationship between Wedgwood and Geary's. I only work for the company, and I have been told not to sell you." (D. Orgell Depos., p. 134, line 28, to p. 135, line 2.)

In early 1972, more than six years before this lawsuit was filed, William J. Feis, Esq., of O'Melveny and Myers wrote a letter to Wedgwood's President, Mr. R. M. Smyth, on behalf of Orgell. Affidavit of Raymond M. Smyth in Support of Motion by Defendant Josiah Wedgwood & Sons, Inc. for Summary Judgment, ¶ 2 and Exhibit A ("Smyth Affidavit"). [2] In that letter, Mr. Feis asserted that Mr. Rose of Wedgwood had " . . . stated that he will not sell the Wedgwood line to Mr. Orgell because of an agreement with Geary's not to do so." Adding that his firm was " . . . unable to imagine a valid business reason" for Wedgwood's refusal to sell its line to Orgell, Mr. Feis noted that " . . . our attention has accordingly been drawn to the possible antitrust implications of your conduct." He expressed his belief that it was in the interest of all concerned " . . . that this matter not be allowed to result in litigation." (Smyth Affidavit, Exhibit A).

Mr. Smyth referred Mr. Feis's letter to Wedgwood's counsel, Mr. Leonard S. Sandweiss, for reply. Smyth Affidavit, ¶ 3; Affidavit of Leonard S. Sandweiss in Support of Motion by Defendant Josiah Wedgwood & Sons, Inc. for Summary Judg-

[2] The "affidavits" of Messrs. Smyth and Sandweiss are in fact declarations proper under 28 U.S.C. § 1746. In the interest of time and after telephonic consultation with the clerk of the court, the titles have been left as they are. References to their "affidavits" should therefore be understood as referring to what are in reality declarations.

ment, ¶ 2 and Exhibit A ("Sandweiss Affidavit").[3] Mr. Sandweiss replied in writing to Mr. Feis's letter on or about March 6, 1972. Sandweiss Affidavit, ¶ 3 and Exhibit B. In his letter he denied the charges made by Mr. Feis, even assuming the accuracy of Mr. Feis's factual representations. Sandweiss Affidavit, Exhibit b, page 2. Yet, despite the litigation threat contained in the letter from Mr. Feis to Mr. Smyth, neither Mr. Sandweiss nor Wedgwood ever heard from Orgell or its counsel O'Melveny and Myers again on these matters. *See* Sandweiss Affidavit, ¶ 4; Smyth Affidavit, ¶ 4.

During the last two years ago, Orgell *again* sought the opportunity to buy Wedgwood on two more occasions. (D. Orgell Depos., p. 56, line 22 to p. 58, line 18; p. 48, line 17-p.50, line 18.) Orgell contends that Wedgwood again refused to sell its line to Orgell, at least in part because of Geary's. (*Id.*, p. 52, lines 8-17; 53, line 28-p. 54, line 8; p. 51, lines 1-25.)

The harm Orgell allegedly has suffered as a result of the actions of the defendants is that Orgell has " . . . been denied product, product that we would have made profits on, and the customer that would have come to us for the product had to go to Geary's; thus, we suffered damage." (D. Orgell Depos., p. 92, lines 6-9.) Approximately a year ago, Orgell began to acquire Wedgwood's bone china and jasperware from a source other than Wedgwood, and to sell these items to its retail customers. (D. Orgell Depos., p. 27, lines 1-14.) However, Orgell has used its Wedgwood products as loss leading items and has made literally no profit on its sales of Wedgwood. (D. Orgell Depos., p. 106, lines 17-25.)

Orgell does not break down its gross sales or costs, or its net sales on china, crystal or silver, classified as such. Rather, Orgell has total sales, total gross and total net figures on its overall business. (D. Orgell Depos., p. 116, line 12-p.117, line 12.) On its overall business, Orgell has shown a profit—an increasing profit—in each of at least the last 10 years. (D. Orgell Depo., p. 86, lines 16 p. 87, lines 3-7 and 20-21.)

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[3] *See* footnote 2.

Office-Supreme Court, U.S.
FILED
MAY 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1777

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID ORGELL, INC.,

Petitioner,

v.

JOSIAH WEDGWOOD & SONS, INC.,

Respondent,

and

GEARY'S STORES, INC., BACCARAT, INC., BUCCELATTI, INC., and CERALENE, INC.,

Defendants.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a claim that thirteen years before the filing of the complaint a non-monopolist manufacturer of a continuously available product engaged in a concerted refusal to deal with a retailer was properly dismissed as barred by the four-year antitrust statute of limitations where the only acts allegedly committed by the manufacturer during the limitations period were simple reiterations of the original refusal to deal.

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No. 80-1777

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID ORGELL, INC.,

Petitioner,

v.

JOSIAH WEDGWOOD & SONS, INC.,

Respondent,

and

GEARY'S STORES, INC., BACCARAT, INC., BUCCELATTI, INC., and CERALENE, INC.,

Defendants.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PRELIMINARY STATEMENT

Respondent Josiah Wedgwood & Sons, Inc. ("Wedgwood") respectfully prays that this Court deny petitioner David Orgell's ("Orgell") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 19, 1981, affirm-

ing the summary judgment of the United States District Court for the Central District of California entered on January 10, 1979, dismissing, as time barred, petitioner's complaint as against respondent.

Wedgwood adopts the statements of undisputed facts set forth in the petition and in Appendices 1a-3a, 6a-7a and 14a-16a thereof. In essence, Wedgwood, a manufacturer of a line of ceramic products, has always refused to sell that line of products to Orgell. Wedgwood first so refused in 1965, and at all times thereafter has done nothing more than reiterate *precisely* the same refusal to sell.

REASONS FOR DENYING THE WRIT

The courts below correctly applied the established, consistent antitrust principle that the statute of limitations governing such a claim accrues with the last overt act causing injury to plaintiff. Where, as here, the antitrust violation alleged is a refusal to deal which is simply reiterated, the decisions are uniform that the date of the last overt act *causing injury* is the date of the *initial* refusal to deal. Petitioner seeks to obfuscate this plain rule by citing numerous cases which are not on point, in a futile attempt to show a misapplication of law and to manufacture a conflict in the circuits.

In reaching its result in this case—that Orgell's lawsuit is time-barred because the last overt act causing injury was the initial refusal to deal—the Ninth Circuit correctly applied its own precedent and principles enunciated by this Court. In so doing, the Ninth Circuit acted in complete accord with the decisions petitioner cites from the Third, Fifth and Eighth Circuits. As this Court has done on numerous occasions, the Ninth Circuit reaffirmed its recognition of the need for a statute of repose. A plenary review of the ruling below by this Court is unwarranted.

I

THE COURT OF APPEAL, IN AFFIRMING THE GRANT OF SUMMARY JUDGMENT BY THE DISTRICT COURT, CORRECTLY APPLIED ITS OWN PRECEDENT AND THE LIMITATION STATUTE.

The Ninth Circuit correctly applied its own precedent, *In re Multidistrict Vehicle Air Pollution,* 591 F.2d 68 (9th Cir.), *cert. denied,* 444 U.S. 900 (1979), to affirm the District Court's decision that this action is timebarred. In *In re Multidistrict,* a refusal to deal was reiterated during the 4-year limitations period. Yet the Ninth Circuit held that plaintiff's action was time-barred:

> "Nothing in the record indicates other than that the 1964 [time-barred] decisions, as to AMF, were irrevocable, immutable, permanent and final. . . . Acts subsequent to January 10, 1965 [including subsequent refusals to deal] . . . were . . . but unabated inertial consequences of some pre-limitations action." 591 F.2d at 72. (Citations omitted.)

The District Court, whose decision in this case was reached before *In re Multidistrict* was decided, correctly relied upon existing authority from the Ninth Circuit and elsewhere, citing in its opinion *Garelick v. Goerlich's, Inc.,* 323 F.2d 854 (6th Cir. 1963); *Steiner v. 20th Century-Fox Film Corp.,* 232 F.2d 190 (9th Cir. 1956); *Manok v. Southeast Dist. Bowling Association,* 306 F. Supp. 1215 (C.D. Cal., 1969); and *Saunders v. National Basketball Association,* 348 F. Supp. 649 (N.D. Ill. 1972).

In *Garelick v. Goerlich's, supra,* for example, the court stated the rationale for the general rule in affirming a district court's ruling that an antitrust action was time-barred because the action accrued with the initial refusal to deal, and was not renewed by subsequent reiterations thereof:

> "The conduct on these two occasions [reiterations of earlier refusal to deal] might be overt acts but obviously the plaintiffs-appellants were not in any way injured or

damaged thereby. The incidents were simply acts that reflected that defendent-appellee continued in refusing to sell its products to plaintiffs-appellants."

Petitioner bases its entire argument on the assertion that *In re Multidistrict* stands for the proposition that to be time-barred, the initial refusal to deal must destroy petitioner's business. Nothing in that or any other relevant case supports that assertion; indeed, the law is clearly contrary to petitioner's suggestion. *See In re Multidistrict,* 591 F.2d at 72; *Garelick v. Goerlich's, Inc.,* 323 F.2d. 854 (6th Cir. 1963) (initial refusal to deal reiterated to *ongoing* business was time-barred.)

Petitioner asserts that "permanency with respect to refusals to deal clearly does not refer to the emphatic nature of the refusing party' negative response. . . ." Petition, page 8. In fact, permanency with respect to refusals to deal refers to nothing *but* the emphatic and permanent nature of the initial negative response. *In re Multidistrict,* 591 F.2d at 72; *Garelick v. Goerlich's, Inc.,* 323 F.2d 854, 856; C. Hills, *Antitrust Advisor* § 11.13, at 710 (2d ed. 1978).

Petitioner's futile effort to show that the Ninth Circuit misapplied its own jurisprudence as a basis for the petition rests on two Ninth Circuit cases that are factually remote from this case. In *Program Engineering Inc. v. Triangle Publications, Inc.,* 634 F.2d 1188 (9th Cir. 1980), the Ninth Circuit reversed on the issue of the statute of limitations where overt acts *other than* a reiterated refusal to deal were alleged within the limitations period. Similarly, in *Twin City Sportservice, Inc. v. Charles O. Finley & Co.,* 512 F.2d 1264 (9th Cir. 1975), the Ninth Circuit held that a cause of action for *tying* continues to accrue so long as the defendent continues to accept benefits under or assert the validity of an unlawful *tying* arrangement.

Petitioner's failure to comprehend the governing standard likewise emerges from its citation of *Hanover Shoe Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968). In *Hanover Shoe,* defendant did not merely refuse to sell; it

required that machinery be leased instead of bought, it collected rentals on those leases and *it entered into replacement leases* during the limitations period. Its monopolistic conduct injured plaintiff on *both* a continuing basis and under *varied* circumstances of inflicted harm.

Petitioner seeks to justify this petition citing cases that analyze the statute of limitations in other than the refusal to deal-reiterated context. In contrast, the well-reasoned opinion of the Ninth Circuit in this case is properly focused and is supported by its own precedents and those of other jurisdictions. It is not an appropriate subject for review by this Court.

II

THE NINTH CIRCUIT'S APPLICATION OF THE STATUTE OF LIMITATIONS IS HARMONIOUS WITH THE DECISIONS OF THE OTHER CIRCUIT COURTS.

The Fifth, Third and Eighth Circuits have adopted the general rule, and the Ninth Circuit has concurred in this case, in *In re Multidistrict, supra,* and in earlier cases, that a new cause of action accrues with each injurious act committed against an antitrust plaintiff. *Poster Exchange v. National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976); *Braun v. Berenson,* 432 F.2d 538, 543 (5th Cir. 1970), *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127 (3rd Cir. 1978); *Pioneer Co. v. Talon, Inc.*, 462 F.2d 1106 (8th Cir. 1972).

However, in the refusal to deal setting, courts have required a further analytical step focusing on what constitutes the injurious act. In this case, as with *In re Multidistrict,* the injurious act was the initial refusal to deal.

The above cases cited by petitioner, Petition, p. 10, do not conflict with the rule of the Ninth Circuit because they are not simply refusal to deal cases. Indeed, in one of the Fifth Circuit cases cited by petitioner, the court was careful to distinguish its fact situation from classic refusals to deal. In *Braun v.*

Berenson, 432 F.2d 538 (5th Cir. 1970), it was held that each time a lessee of shopping mall space attempted to lease additional space or move to another location within the mall, but was refused, a new cause of action accrued.

> "The plaintiff and the defendants did not stand in a continuing relationship to each other as *buyer and seller of a product,* as in the classic 'refusal to deal' situation. Moreover, the store spaces sought by the plaintiff were not a continuously available commodity, as were the products involved in the cases relied on by the defendants, but became available only periodically and under uniquely different circumstances, so that even the second refusal to rent . . . was not merely the reiteration of the previous refusal to lease . . . but was a new overt act giving rise to new and independent damages to the plaintiff. . ." 432 F.2d at 543. (Emphasis in original.)

Similarly, *Imperial Point Colonnades Condominium, Inc. v. Mangurian,* 549 F.2d 1029 (5th Cir.), *cert. denied sub nom. Mangurian v. Thompson,* 434 U.S. 859 (1977), concerned not a refusal to deal, but a tying arrangement wherein it was held that the statute of limitations began anew each time rents were collected pursuant to the tied lease, since a different affirmative act was taken by the defendant on each such occasion to reap *additional* benefits from its allegedly anticompetitive actions.

Poster Exchange v. National Screen Service Corp., 517 F.2d 117 (5th Cir.), *cert. denied,* 423 U.S. 1054 (1976), concerned not the simple reiteration of a refusal to deal, but alleged monopolization, monopolistic pricing and exclusion from an entire industry as well. Petitioner nowhere contends that *any* of those special circumstances existed in *this* case; and they obviously alter the analysis significantly since a refusal to deal by a monopolist has effects close to those of a tying arrangement, and has the *purpose* of extending or maintaining a monopoly, over and above the mere desire not to deal.

When confronted with a classic refusal to deal situation outside of the monopoly context, the Fifth Circuit, as noted in *Braun v. Berenson,* 432 F.2d at 543, has ruled, in accord with the Ninth and other circuits, that the relevant injurious act is the initial refusal to deal and the action, if time-barred, remains so despite subsequent reiterations within the limitations period. *See also Southeastern Hose, Inc. v. Imperial-Eastman Corporation,* CCH 1973-1 Trade Cas. ¶ 74, 479 (N.D.Ga. 1973).

In the Third Circuit case cited by petitioner, *Harold Friedman, Inc. v. Thorofare Markets, Inc.,* 587 F.2d 127 (3d Cir. 1978), the court held in a case concerning a refusal to extend a lease that the action was not barred by the statute of limitations because damages were *too speculative* at the time of the initial refusal to extend the lease. Petitioner here has not contended that its damages were too speculative at the time Wedgwood initially refused to deal with it and the cited case is again inapposite. And, of course, *Braun v. Berenson, supra,* recognized the unique character of refusals to *lease,* as contrasted with a refusal to sell the kind of standardized, continuously available product which is at issue in this case.

Pioneer Co. v. Talon, Inc., 462 F.2d 1106 (8th Cir. 1972), *is the only case* cited in Orgell's petition that actually concerns and is limited to a refusal to deal. Yet, it too is entirely consistent with *In re Multidistrict, supra,* and the Ninth Circuit decision in this case. Here, a course of dealing never existed between the parties at *any* time. Therefore, when Orgell initially requested the Wedgwood line and was refused, the injurious act occurred and was complete. Reiteration in no way altered the complexion of the original act or the nature of the blow struck thirteen years before the complaint was filed.

In *Pioneer,* a prior course of dealing had existed between the parties, and expectations had therefore been created. At a point outside the limitations period, an agent of Talon orally announced the policy by which it would no longer supply zippers to Pioneer. The court held that, because of the pre-existing relationship between the parties, an injurious act did not occur until an order was actually placed and was refused by

Talon, which occurred within the limitations period. The announcement of no further dealing could not have caused damage, in the Court's view, because there was then no contract between the parties. "It is . . . clear that even though [the agent] gave notice, it terminated nothing of legal significance." 462 F.2d at 1108. Here, of course, no relationship ever came into being between petitioner and respondent Wedgwood. And the original refusal to deal was confirmed at least once *in writing, unequivocally,* six years before petitioner filed its complaint.

The Circuits are in agreement. A new cause of action does accrue with each *new* injurious act against an antitrust plaintiff. But, where no monopoly or monopolization is claimed, and the injurious act is a simple refusal to deal which is merely reiterated within the statute of limitations period, the injury flows from and is complete with the initial refusal to deal. This is not a "crazy-quilt application of the antitrust laws throughout the nation" as petitioner asserts, Petition, p. 11. It is a logical, careful and consistent application of settled basic rules to a particular situation.

CONCLUSION

This case is not controversial; it is simple, and presents no novel questions of law. The court below applied its own precedents in the only legally correct way to affirm the dismissal of petitioner's time-barred antitrust complaint. Its decision was inevitable if it was to be consistent with the decisions of other Circuits. Had the court below ruled otherwise, in the context of this case, it would have "effectively destroy(ed) the statute of limitations as a statute of peace." *Sherman v. Goerlich's Inc.,* 238 F.Supp. 728, 730 (E.D.Mich. 1963), *cert. denied,* 238 U.S. 830 (1965). For all of the foregoing reasons, respondent Josiah Wedgwood & Sons, Inc. prays that the petition of David Orgell, Inc. for writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1980

DAVID ORGELL, INC., PETITIONER

v.

JOSIAH WEDGWOOD & SONS, INC., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

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Preliminary Statement

On August 10, 1981, respondent's counsel received the *amicus curiae* brief ("Brief") filed by the Solicitor General of the United States. Respondent submits this supplemental brief pursuant to Rule 22(6) of the Rules of the United States Supreme Court, in order to address substantial misstatements of fact and law made in the Brief.

I

THE BRIEF RELIES ON A MATERIALLY INCORRECT STATEMENT OF THE FACTS.

Respondent Wedgwood allegedly refused to sell a line of its merchandise to petitioner Orgell in 1965 as a result of a conspiracy with another defendant. That refusal was reiterated in 1968, 1972, 1976 and 1977. The Solicitor General's Brief omits any mention of the 1972 refusal, when: (1) petitioner engaged the services of O'Melveny & Myers, one of the largest and best law firms in Los Angeles, who wrote to respondent threatening antitrust legal action if respondent did not sell to petitioner; (2) respondent's attorney denied petitioner's version of the facts, but stated, citing authority, that even if it were correct, petitioner's claim would still not be actionable, and invited petitioner's attorneys to show how he was wrong on the law or the facts, in which case he would take the matter up further with his client and advise accordingly; and (3) the legal claim was dropped in that O'Melveny & Myers never again communicated with respondent or its attorney, and neither did petitioner until four years later, in 1976, when it again asked to be sold the "Wedgwood" line. Only by omitting these facts could the Brief argue in the context of this case that its version of the applicable limitations rule was required

> "[since] those plaintiffs most likely to bring suit more than four years after an initial refusal to deal are the ones most likely to lack alert antitrust counsel and, hence, least likely to become aware of a prophylactic rule until the deadline has passed." (p. 6, n.4).

Even more importantly, omitting petitioner's pursuit and abandonment of its legal claim (and threat to sue) permitted the Brief to overlook the finding in *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir.) *cert. denied*, 444 U.S. 900 (1979), "that AMF [plaintiff] itself was convinced by the last quarter of 1964 that it was out of the market" which the court employed in showing that the refusal to deal in that case

had by a pre-limitation period date become "irrevocable, immutable, permanent and final" notwithstanding later approaches by AMF to some of the alleged conspirators. In this case, similarly, the finality of respondent's decision not to deal with petitioner was underscored, reinforced and acquiesced in by petitioner's own apparently carefully considered action in dropping its legal claim against and threat to sue respondent.

II

THE SOLICITOR GENERAL MANUFACTURES A CONFLICT AMONG THE COURTS OF APPEAL ON THE STATUTE OF LIMITATIONS ISSUE IN REFUSAL TO DEAL CASES BY MISREADING APPLICABLE CASE LAW.

The Solicitor General contends that, *standing alone*, each reiteration of a refusal to deal gives rise to a new claim for the purposes of 15 U.S.C. § 15(b) in the Fourth, Fifth and Eighth Circuits, but not in the Sixth and Ninth Circuits. To reach that conclusion, he must ignore the realities of the cases he reviews, lump together refusal to deal cases with monopolization and tying cases, and imagine horribles which lack any support whatever, in or outside of the record.

The governing rule is the one announced by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), and referred to by the Solicitor General (Brief, pp. 2-3). In a "continuing conspiracy" case, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . as to those damages, the statute of limitations runs from the commission of the act."

However, if there is "injury" of a particular kind, reiteration simply confirms it, creating added damages but no new claim. The claim accrues, and the statute begins to run as to

injury of a particular type, when an injury of that type has unquestionably and ascertainably occurred. *Zenith, supra,* 401 U.S. at 338-39.

The Solicitor General's "conflict" rests primarily on Fifth Circuit cases involving tying and monopolization claims. Yet, he overlooks the fact that in each, *new affirmative* acts took place inside the limitations period aimed at *altering qualitatively, consolidating* and *extending* the allegedly anticompetitive conduct, causing injury independent in character from that previously suffered by the plaintiff. *See, e.g., Imperial Point Colonnades Condominium, Inc. v. Mangurian;* 549 F.2d 1029, 1035 (5th Cir.), *cert. denied,* 434 U.S. 859 (1977) (tying case: collection of and *increases* in rents within limitations period); *Poster Exchange, Inc. v. National Screen Service Corp.,* 517 F.2d 117, 123 (5th Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976) (court stressed it confronted a *monopolization* case where one defendant conspired during the limitations period to *consolidate* the other defendant's monopoly position in return for a share of the monopoly profits derived thereby).

There is no conflict between these decisions and those which hold that the simple reiteration of a refusal to deal in a non-monopoly context does not start the statute of limitations running anew. Contrary to the intimation of the Brief (page 3, n.4), substantial antitrust policy reasons support the distinction between monopoly and non-monopoly situations. In the former, the gravamen of the antitrust evil is the *monopoly itself,* which a reiterated refusal to deal enhances and consolidates. In the latter, the gravamen of the antitrust evil is the simple refusal to deal itself, which reiteration does nothing to enhance or consolidate. The mere repetition *violates no antitrust rule or policy at that juncture qualitatively different from the original, final refusal to deal.* Tying is akin to monopoly, because each *exercise* of the tie-in confirms the complete market control the arrangement represents and creates *new* injury to competition in the qualitative sense.

The Fourth and Eighth Circuit cases the Solicitor General urges as conflicting with the Ninth and Sixth Circuits simply establish that a refusal to deal must be unequivocally *communicated* to the plaintiff and *injury result thereby;* once that happens, the cause of action accrues. In *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976), the issue was when a cause of action arose for the allegedly anticompetitive award of a cable television franchise to a competitor of plaintiff's. The court held that "exclusion from participation in an industry constitutes a continuing conspiracy *unless the exclusion is final in its impact.*" *Id.*, at 572 (emphasis added).

The court found, however (*Id.*, at 573) that the possibility had been left open that other franchises would be granted, and that the initial grant had been on a nonexclusive basis. Thus the refusal to deal was not "final" until plaintiff was later definitely informed that in any case it would not get a franchise. The limitations period was held to run from the time the plaintiff was so informed, even though the city council had at that time stated it would give some thought to plaintiff's request, but then did nothing.

In *Pioneer Co., Inc. v. Talon, Inc.*, 462 F.2d 1106 (8th Cir. 1972), plaintiff had been doing business with defendant *on an order by order basis* for five years. One of defendant's salesmen, allegedly pursuant to an anticompetitive conspiracy, verbally informed plaintiff that defendant's sales agent would "no longer sell" to plaintiff and that "all business relations were terminated." 462 F.2d at 1107. However, plaintiff's President testified that he had received "no formal commitment from anyone that orders would not be accepted." *Id.* His "first notification" came when two orders he sent in were together rejected in a letter mentioning *no previous* termination of business relations and announcing a decision to "discontinue sales to jobbers whose requirements have been modest." *Id.* at 1108. *No subsequent orders were placed.* The Solicitor General's discussion of *Pioneer* itself simply confirms that in holding

that the statute of limitations had not run until the "formal notification" represented by the refusal of the orders, the court properly measured the limitations period from the date when the refusal to deal was *unequivocally communicated, and ascertainable injury occurred,* which it held did not happen until the orders were formally refused.

The teaching of *Charlotte Telecasters* and *Pioneer* is clear. Where a defendant has purportedly refused to deal with a plaintiff but, by its own words or conduct has either suggested that the door remains open or has failed effectively to communicate the refusal, the plaintiff's claim has not accrued. Only where the defendant refuses to deal and does so in a fashion which clearly indicates that the decision is intended to be real and final is the claim fixed; however, it is unquestionably fixed at that point.

These principles are clearly in accord with the ruling in *In re Multidistrict Vehicle Air Pollution, supra,* 591 F.2d at 68, the decision which the Ninth Circuit relied on in affirming summary judgment in respondent's favor. There, as here, plaintiff sought to do business with defendants. There, as here, plaintiff argued that it had made other, futile attempts to do business with defendants during the limitations period. 591 F.2d at 71. There, as here, and *unlike* in *Charlotte Telecasters* and *Pioneer,* "whatever hope of business [plaintiff] may have clutched, its source could not have been actions or words of the [defendants]." *Id.* at 72.

The mere fact that decisions can *always* be changed was not enough for the Ninth Circuit to conclude that the refusal to deal with which it was concerned was other than "irrevocable, immutable, permanent and final." Thus, *In re Multidistrict* does not, as the Brief appears to contend on page 4, stand for the proposition that *any* additional refusal to deal starts a new limitations period. To the contrary, as above discussed, it holds that if a new refusal follows a final refusal, the new one is but an echo, causing no new damage and starting no new limitations period. Indeed, the court cited for that very proposition

language in *Imperial Point Colonnades, supra,* 549 F.2d at 1029: "[W]here all the damages complained of necessarily result from a pre-limitations act by defendant, no new cause of action accrues for any subsequent acts committed by defendant within the limitations period *because those acts do not injure plaintiff.*" *In re Multidistrict, supra,* 591 F.2d at 72 (emphasis supplied).

This view is logical as well as legal. The antitrust laws seek to deter anticompetitive behavior. They also seek to encourage prompt corrective action. If a refusal to deal pursuant to a conspiracy is simply reiterated, the reiteration causes no *new* anticompetitive or antitrust injury if neither the plaintiff nor the marketplace had any reason to believe that the refusal to deal was open to reconsideration. If a refusal to deal pursuant to one conspiracy is reiterated pursuant to a *different* conspiracy, then there is *new* anticompetitive injury giving rise to a new claim. If a refusal to deal is not merely reiterated but expanded—applied to other products or markets—again, there is a different injury and a new claim.

The Solicitor General recommends that the petition be granted so that the Court may rule that each successive refusal to deal begins a new limitations period, even where each new refusal is merely a reiteration of prior refusals over a 13-year period, and even where a disappointed retailer has during that period hired a lawyer, threatened suit, and then dropped his claim when rebuffed again. According to the Brief, someone in the position of respondent (and not alleged to be a monopolist) can *never* shake loose from a retailer who "won't take no" for an answer. Every day for 13, or perhaps 25 or 50 years, the retailer can, according to this view, start a new limitations period running by simply writing another letter, or calling again, perhaps just leaving a message. It would appear, according to the Brief, that in such a situation the statute would commence to run only when the supplier and/or the retailer went out of business. In short, the recommendation in the Brief should not be adopted because, among other reasons, it is

advanced to achieve a result that, respectfully, makes no sense, particularly in a case like this one which does not involve a claim of monopoly or monopolization.

The conflict the Solicitor General creates between the Circuits is, as has been demonstrated, one the courts themselves do not acknowledge. *See generally* L. Sullivan, *Antitrust* 775-76 (1977). Indeed, the "conflict" is the result of tortured readings (and misreadings) of the applicable cases, and a failure to appreciate the pertinent antitrust policies which are their foundation.

Even in clear disputes of public significance, this Court has always avoided granting petitions which present illusory rather than true conflicts amongst the courts of appeal. It has frequently returned to the language of *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), where it stressed that in cases of such purported conflict, no writ should be granted except ". . . in cases where there is a real and embarrassing conflict of opinion between the circuit courts of appeal." This is in no sense such a case.

III

THE REAL QUESTION IN THIS CASE IS WHETHER THE STATUTE OF LIMITATIONS BEGINS TO RUN ONCE A REFUSAL TO DEAL IS EVIDENTLY FINAL.

The Brief suggests under "Question Presented" that respondent contended and the Ninth Circuit ruled that suit has to be brought "within four years of the initial refusal". No such contention and ruling has been made. The real issue is whether the statute commences to run when a refusal has become final and unequivocal, regardless of its subsequent reiterations. Such a "final" refusal may or may not be the *first* refusal to deal. To suggest otherwise, as the Brief, does, is to mischaracterize what this Court is asked to review. And that is critical, because on the *real* issue before this Court, there is no conflict among the courts of appeal in the factual context of this case. Only by presenting a *false* question can the Brief argue in favor of the petition.

It is a commonplace that this Court does not decide abstract questions of law or render advisory opinions. As Mr. Justice Brennan has put it: "While the Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *S.S. Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

CONCLUSION

Respondent is disturbed by the Solicitor General's mischaracterization of the applicable facts, cases and policies involved in this proceeding. The courts are in harmony on the application of the Clayton Act's statute of limitations to the varied antitrust claims that can be urged. Only the interpretation which they have adopted—with which the decision below is entirely consistent—serves both to further the objectives of the substantive provisions of the antitrust laws and the need for predictability and repose that the passage of a statute of limitations addressed. The Court should reject the position urged by the Solicitor General and deny the petition.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a plaintiff who has suffered repeated unlawful refusals to deal is barred by the four-year statute of limitations from obtaining relief from any refusal because he has not brought suit within four years of the initial refusal, notwithstanding the fact that the subsequent refusals for which relief is sought occurred less than four years prior to suit.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioner David Orgell, Inc. ("Orgell"), is a retailer of silver, china and crystal in the Los Angeles area. Respondent Josiah Wedgwood & Sons, Inc. ("Wedgwood"), manufactures china and dinnerware and sells its products to various retailers in the Los Angeles area, including Geary's Stores, Inc. ("Geary's"), one of Orgell's competitors (Pet. App. 1a).

In 1965, Orgell sought and was refused the opportunity to retail Wedgwood products. In 1968 and on two occasions between 1976 and 1978, Orgell again sought and was refused access to the Wedgwood line (Pet. App. 2a).

In 1978, Orgell sued Wedgwood, Geary's, and other china and dinnerware manufacturers, alleging that they had conspired to refuse to deal with Orgell, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The district court granted summary judgment to Wedgwood on the ground that the suit was barred by the four-year statute of limitations applicable to private antitrust suits under Section 4B of the Clayton Act, 15 U.S.C. 15b, notwithstanding the fact that Wedgwood had refused to deal with Orgell within the four years preceding the suit (Pet. App. 5a-7a). The court of appeals affirmed (Pet. App. 1a-3a), holding that the cause of action accrued with the first refusal to deal in 1965 and that each subsequent refusal was only " 'a reaffirmation of the original decision not to deal with the plaintiff' " (*id.* at 3a).

ARGUMENT

The court of appeals' decision that repeated unlawful refusals to deal do not give rise to new causes of action exacerbates a conflict among the circuits. Moreover, the decision poses needless risks for antitrust enforcement without advancing the policies that underlie the statute of limitations. Accordingly, we submit that review by this Court is warranted.[1]

1. Section 4B of the Clayton Act, 15 U.S.C. 15b, provides that private antitrust claims "shall be forever barred unless commenced within four years after the cause of action accrued." As this Court observed in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), in the context of an ongoing conspiracy to violate the antitrust laws, Section 4B has usually been construed to mean that "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the

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[1] Like the court of appeals and the district court, we express no view as to the merits of Orgell's substantive claim.

damages caused by that act and * * *, as to those damages, the statute of limitations runs from the commission of the act."

The courts of appeals have split on the issue of applying the statute of limitations to suits for repeated refusals to deal. The Fourth, Fifth and Eighth Circuits have held that repeated refusals to deal give rise to new causes of action and thereby allow plaintiffs to bring suit within four years of the most recent refusal. *Charlotte Telecasters, Inc.* v. *Jefferson-Pilot Corp.*, 546 F. 2d 570, 572 (4th Cir. 1976); *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F. 2d 117, 123-128 (5th Cir. 1975); *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian*, 549 F. 2d 1029 (5th Cir.), cert. denied, 434 U.S. 859 (1977) (elaborating on *Poster Exchange*); *Pioneer Co.* v. *Talon, Inc.*, 462 F. 2d 1106 (8th Cir. 1972).[2] These courts qualify the general rule with two narrow caveats, both of which are implicit in this Court's decision in *Zenith*: (1) the initial refusal to deal must not have been irrevocable; and (2) the plaintiff actually must have been denied an opportunity to deal within the four-year period. See, *e.g.*, *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian, supra*, 549 F. 2d at 1035. See also *In re Multidistrict Vehicle Air Pollution*, 591 F. 2d 68, 72 (9th Cir.), cert. denied, 444 U.S. 900 (1979). The

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[2]Although Wedgwood suggests (Br. in Opp. 6) that *Poster Exchange* is confined to monopolization suits, the Fifth Circuit has not so limited it. See *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian, supra*, 549 F. 2d at 1034-1035. See also II P. Areeda & D. Turner, *Antitrust Law*, para. 325b, at 122 n.19 (1978).

Wedgwood's attempt (Br. in Opp. 7-8) to distinguish *Pioneer* on the ground that no harm accrued to Pioneer from the initial notice of termination, leaving the first refusal to accept an order (which occurred within the limitations period) as the source of harm, neglects the case's far broader holding: "[I]t is quite clear that [Talon's] continued refusals to deal caused new injury to Pioneer *each time an order was refused*." 462 F. 2d at 1109 (emphasis added; footnote omitted).

courts have stressed that the irrevocable-refusal exception is extremely limited in scope. If the circumstances surrounding the initial refusal to deal make the decision irrevocable or the harm it causes irretrievable, subsequent refusals do not cause new harm, since the initial choice compelled all the harm that followed. See *In re Multidistrict Vehicle Air Pollution, supra,* 591 F. 2d at 72; *Poster Exchange, Inc.* v. *National Screen Service Corp., supra,* 517 F. 2d at 126. Otherwise, a mere refusal to deal, however emphatic, is not deemed to be final or irrevocable; as long as the decision is capable of being reversed, each subsequent refusal to deal inflicts new harm on the plaintiff.

There is, however, a conflicting line of authority. The Sixth Circuit has held that subsequent refusals to deal do not give rise to new causes of action, on the ground that even if the refusals qualify as "overt acts," they do not themselves cause new harm. *Garelick* v. *Goerlich's, Inc.,* 323 F. 2d 854, 856 (6th Cir. 1963) ("[T]he [subsequent] incidents were simply acts that reflected that defendant-appellee continued in refusing to sell its products to plaintiffs-appellants"). *Garelick* has found support in several district courts, including the Southern District of New York. See *Chapa* v. *Volkswagen of America, Inc.,* [1974-1] Trade Cas. para. 74,911 (D.D.C. 1974); *Southeastern Hose, Inc.* v. *Imperial-Eastman Corp.,* [1973-1] Trade Cas. para. 74,479 (N.D. Ga. 1973); *Manok* v. *Southeast District Bowling Ass'n,* 306 F. Supp. 1215, 1221 (C.D. Cal. 1969); *Ansul Co.* v. *Uniroyal, Inc.,* 306 F. Supp. 541, 569 (S.D.N.Y. 1969), aff'd in part and rev'd in part on other grounds, 448 F. 2d 872 (2d Cir. 1971), cert. denied, 404 U.S. 1018 (1972).[3] Commentators also have treated *Garelick* as stating the general rule. See II P. Areeda & D. Turner,

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[3]But see *Borger* v. *Yamaha Int'l Corp.,* 625 F. 2d 390, 398 (2d Cir. 1980) (dictum).

Antitrust Law, para. 325b, at 121 (1978); cf. 13 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 103.02[1][a] (1980).

The decision below aligns the Ninth Circuit with the Sixth Circuit on the issue. Although the court below purported to rest its ruling on the irrevocable-refusal exception employed by the Fourth, Fifth and Eighth Circuits, it has expanded the exception so widely as to swallow the rule. Rather than focusing on the irreversibility of the refusal to deal, the court of appeals based its decision upon the "unequivocal" nature of the initial refusal (Pet. App. 3a). On this rationale, no suit for repeated refusals to deal could ever be brought more than four years after the initial refusal, since every subsequent refusal would qualify as a "reaffirmation" of the original decision.

2. The statute of limitations for repeated refusals to deal now varies from circuit to circuit; how quickly a plaintiff must sue depends on the fortuity of where he brings suit. This division among the courts of appeals perpetuates the very "confusion and discrimination" that Congress sought to avoid by adopting a uniform federal statute of limitations for the antitrust laws in 1955. S. Rep. No. 619, 84th Cong., 1st Sess. 5 (1955); H.R. Rep. No. 422, 84th Cong., 1st Sess. 7 (1955). This Court should grant review to restore uniformity among the circuits.

We think, moreover, that the Court should resolve the conflict by reversing the decision below and approving the rule followed by the Fourth, Fifth and Eighth Circuits. Provided that the original refusal is not "irrevocable" within the narrow meaning of that term (see page 4, *supra*), where there are repeated unlawful refusals to deal each subsequent unlawful refusal is the cause of whatever harm follows it, because that harm would have been forgone but for the new unlawful refusal. The contrary position of the

court below rests on the erroneous premise that subsequent decisions whether or not to deal have no effect.

The decision below is not justified by any of the policies underlying the statute of limitations. Statutes of limitations safeguard judicial accuracy, preserve settled expectations, insure timely notice of claims, and generally "promote justice by preventing surprise through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980); *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979); *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944). Barring suits for repeated refusals to deal advances none of these goals, since, in order to maintain a cause of action under the statute, the plaintiff must demonstrate that it has been refused an opportunity to deal within the four-year period. See *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian, supra*, 549 F. 2d at 1041. Nor is the Ninth Circuit's interpretation of the statute of limitations needed as an incentive to bring suit quickly, since it is always in a plaintiff's interest to seek relief as quickly as possible. See *id.* at 1044.[4]

Moreover, the Ninth Circuit's rule is particularly undesirable in refusal to deal cases. A merchant who hopes eventually to obtain a supplier's products may well be less likely to bring suit immediately and jeopardize a potentially profitable future business relationship than to wait and make another request to carry the goods. The Ninth Circuit's rule will force buyers to choose between bringing what

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[4]Even if a rule barring refusal-to-deal suits brought more than four years after an initial refusal to deal otherwise would serve a prophylactic function, those plaintiffs most likely to bring suit more than four years after an initial refusal to deal are the ones most likely to lack alert antitrust counsel and, hence, least likely to become aware of a prophylactic rule until the deadline has passed.

may turn out to be a needless and undesired lawsuit and forgoing the protection of the antitrust laws. Forcing such a choice is contrary to the public interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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